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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 212

A. S. GENECOV,

Petitioner,

vs.

STATE OF TEXAS, AND R. A. SCHMIDT, SHERIFF, DALLAS COUNTY

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

GABRIEL HAWKINS GOLDEN,
JOEL MANUEL HOPPENSTEIN,
Counsel for Petitioner.

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A. S. GENECOV,
Petitioner and Appellant Below,

vs.

STATE OF TEXAS, AND R. A. SCHMIDT, SHERIFF, DALLAS COUNTY,
Respondent and Appellees Below

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Texas, and Brief in Support Thereof.

To the Honorable, the Supreme Court of the United States:

Your petitioner, A. S. Genecov, respectfully petitions this Honorable Court for a writ of certiorari to the Supreme Court of the State of Texas.

Summary Statement of the Matter Involved

This case arose as an original habeas corpus proceeding filed in the Supreme Court of Texas by A. S. Genecov, petitioner herein, wherein he sought relief from an order of

the District Judge of the 116th District Court in and for Dallas County, Texas, adjudging the petitioner to be in contempt of court and from a commitment issued in pursuance thereof. Petitioner sincerely and urgently contends, as he has contended throughout the entire proceedings including those in the Supreme Court of Texas, that he has been denied due process of law as guaranteed to him by the Constitution of the United States in that there is no evidence whatsoever in the record to support his conviction and that he has been denied the equal protection of the laws likewise as guaranteed to him by the Constitution of the United States. His application for habeas corpus was granted by the Supreme Court of Texas on January 22, 1945, and the case set for hearing on February 14, 1945. In granting the application, the Supreme Court ordered that the petitioner be released from the custody of the Sheriff of Dallas County upon petitioner filing a bond in the sum of $500.00, which was duly executed, and the petitioner released on January 22, 1945.

The Supreme Court of Texas thereafter, on March 14, 1945, wrote an opinion and, expressly refusing to consider the evidence and constitutional questions raised, ordered the petitioner remanded to the custody of the Sheriff of Dallas County, Texas. A motion for rehearing was filed in due time and overruled by the Supreme Court of Texas on the 11th day of April, 1945. Thereafter, a stay was requested from the Supreme Court of Texas to permit the petitioner to petition for writ of certiorari to this Honorable Court, and such stay was granted on the 25th day of April, 1945, until July 9, 1945, conditioned upon petitioner filing a bond in the sum of $1,000.00, which was duly performed. The constitutional questions were specifically raised in petitioner's application for writ of habeas corpus in paragraph 4 thereof and particularly the last paragraph

of sub-section (d) of paragraph 4 and sub-section (h) (R. 2-6); said paragraph reading in part as follows:

> "Your petitioner would further show that in the creation of said Salt Water Control Board, and the enforcement of said general plan for the disposal of salt water and the judgment in contempt, that your petitioner is being deprived of due process of law, and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.
>
> * * * * * * *
>
> (h) The Honorable District Court abused his discretion in entering said judgment in contempt because said judgment is based upon no evidence whatsoever showing any overt act or affirmative act on the part of your petitioner in violation of said temporary injunction."

These constitutional questions were further preserved and urged by petitioner in his motion for rehearing timely filed with the Supreme Court of Texas (R. 311).

History of Litigation

In 1939, the State of Texas, through Gerald C. Mann, its Attorney General at the time, filed suit in the 116th District Court of Dallas County, Texas, against one hundred and fifty or more separate defendants, purportedly for the purpose of enjoining the defendants from polluting the waters of the Neches and Angelina Rivers and their tributaries, which flow through the East Texas Oil Field. This suit, in which several amended petitions have been filed, was entitled "The State of Texas, et al. v. Sun Oil Co., et al.," and it became Cause No. 46,645-F on the docket of the 116th District Court. The Roosth & Genecov Production Company, a corporation, of which petitioner was presi-

dent, was one of the defendants named in this original suit.

The State alleged that the defendants were the owners or operators of producing oil wells in the drainage areas of the rivers named and their tributaries, and that the defendants were permitting or allowing salt water to flow or escape from such wells into and through such tributaries and into the rivers named, thereby polluting the rivers and their tributaries.

Said Cause No. 46,645-F has never been brought to a trial on its merits, although it has been pending for a period of five or six years. At the time suit No. 46,645-F was filed, Art. 698a, Penal Code, 1925, which was then in force, permitted salt water to be discharged into fresh water streams if the discharges did not exceed 2,000 parts of salt to 1,000,000 parts of water; and it was, seemingly, the purpose of the Attorney General in filing this suit to set up a legislative or administrative procedure to provide for and regulate the disposal of salt water in the East Texas Oil Field.

Among the great number of defendants in Cause No. 46,645-F were many of the major oil companies, who had salt water injection wells for the disposal of salt water from their wells, and they were not interested in the plan proposed by the Attorney General. On the motion of the State in said Cause No. 46,645-F, the Roosth & Genecov Production Company, and more than one hundred other defendants in said cause, were severed from Cause No. 46,645-F, and set up under Cause No. 53,113-F, styled "The State of Texas v. Acme Oil & Gas Co., Ltd.," on the docket of the 116th District Court, which likewise has never been brought to trial on its merits.

In cause No. 53,113-F, the State and the defendants in that cause, acting under Art. 698a, Penal Code, 1925, entered into what was termed a "plan," under which a so-called "Salt Water Control Board" was set up; rules

and regulations were provided for the disposal of salt water into the fresh water streams in the East Texas Oil Field; a charge of $1.50 per well per month was assessed against the defendants for the right to dump salt water; and a further provision was made for the designation by the parties and for the appointment by the 116th District Court, of an engineer, supervisor or proctor, at a salary of $300.00 per month, to administer the plan under the so-called Salt Water Control Board (R. 37-41). This plan, together with all its provisions, was entered as a judgment of the 116th District Court, though there is no legislative or constitutional authority for the creation or operation under the laws of the State of Texas of a so-called Salt Water Control Board.

The Roosth & Genecov Production Company, of which petitioner is the President and General Manager, operated under the plan until Article 698a, Penal Code, 1925, was held invalid by the Texas Court of Criminal Appeals ("Stevenson v. State," 167 S. W. 2d, 1027) and Article 698b, Penal Code, 1925, was enacted which provides, among other things, that it shall be unlawful for *any person,* firm or corporation, or any officer, agent or employee thereof, to pollute any public body of surface water within the state, and a penalty of not less than $100.00 nor more than $200.00 is fixed for each violation thereof. (Thus, there is no authority for the District Court to license violation of the Statute by payment of a fee.)

Subsequent to the aforementioned Court of Criminal Appeals decision, the Legislature repealed Articles 698 and 698a, Penal Code, 1925, and enacted Article 698b, Penal Code, 1925. The Roosth & Genecov Production Company thereupon withdrew from the plan upon the ground that further disposal of salt water into the Neches and Angelina Rivers and their tributaries was unlawful, and the Com-

pany made arrangements of its own to take care of the salt water from its wells.

In 1940, on motion of the State, the Roosth & Genecov Production Company was severed from the rest of the defendants in Cause No. 53,113-F, and the cause as to the Roosth & Genecov Production Company became and now is styled "The State of Texas v. Roosth & Genecov Production Company," No. 74,383-F on the docket of the 116th District Court. In said causes, a motion for an order to show cause, and an order to show cause, were served upon the petitioner, wherein petitioner, and various other parties named, were required to show cause why they should not be required to pay the sum of $1.50 per producing well per month, and wherein petitioner and the Roosth & Genecov Production Company were alleged to have been delinquent in the payment of $1.50 per well per month to an amount of $1,062.00. Petitioner refused to pay said delinquent assessment and a motion in contempt was filed against him, Sam Roosth, and the Roosth & Genecov Production Company; and, on a hearing thereof, the court undertook to find thirty separate and distinct contempts, under one motion for contempt, where the alleged violation, if there were any violation, constituted a single continuous contempt at the most; and a punishment was fixed at a fine of $50.00 and one day's imprisonment for each so-called offense, or for a total of $1,500.00 and thirty days' imprisonment, together with all costs. It was and is the petitioner's position that there is no evidence whatsoever in the record to support his conviction for contempt and that he has been discriminated against and denied the equal protection of the laws in violation of the Constitution of the United States in that the disposal of salt water under the rules and regulations of the so-called Salt Water Control Board is in violation of Article 698b, Penal Code of Texas, 1925, and in violation of the Fifth and Fourteenth

Amendments of the Constitution of the United States in that the legislature of Texas has not created or established any Salt Water Control Board, or provided for the levying of a tax or an assessment for the disposal of salt water from the producing oil wells in East Texas. Petitioner has been ordered imprisoned and deprived of his liberty for allegedly doing the very acts which the 116th District Court, Dallas County, Texas, in violation of the Texas Penal Statute, licenses and permits to be done by others for the payment of a fee of $1.50 per month per well. The so-called "Salt Water Control Board" is an entity unknown to the State Constitution or any legislative act. It has neither legislative nor constitutional father or mother but is the creature of an usurpation of power. There is no evidence whatsoever in the record (as shown in the accompanying brief) to support petitioner's conviction and his conviction constitutes the rankest type of discrimination and denial of the equal protection of laws contrary to the fifth and fourteenth amendments to the Constitution of the United States.

A conviction for criminal contempt upon evidence which does not establish guilt beyond a reasonable doubt is a denial of due process of law in violation of the fourteenth amendment of the Constitution of the United States and the refusal of a state court of last resort to consider the record evidence upon an original habeas corpus proceeding, which is the only way in such state whereby the conviction can be challenged or reviewed, is a further denial of due process of law contrary to the fourteenth amendment of the Constitution of the United States.

This Court Has Jurisdiction

1. The date of the judgment of the Supreme Court of Texas to be reviewed is March 14, 1945, with motion for rehearing being overruled on April 11, 1945. This judg-

ment is a final judgment by the highest court in the State of Texas in which a decision could be had.

2. This case involves the decision by a state court of last resort of an important federal question of substance contrary to the applicable decisions of the Supreme Court of the United States, to-wit, the decision in the case of "Gompers v. Buck's Stove & Range Company," 221 U. S. 418, 55 L. Ed. 797, wherein it was held that in a criminal contempt proceeding that the defendant is "presumed to be innocent" and that "he must be proved guilty beyond a reasonable doubt" in order to constitute due process of law as guaranteed by the Constitution of the United States, while in the instant case the Supreme Court of Texas has held that such guaranty of due process of law is fulfilled if there is merely some character of hearing without regard to the quantum of the evidence adduced therein, expressly refusing to even consider the federal constitutional questions raised, preserved and urged that there was no evidence in the record whatsoever to support the conviction for criminal contempt by the court below. This decision by the Supreme Court of the United States has been followed by the Court of Criminal Appeals of the State of Texas, the court of last resort in criminal matters in such state, in the case of "*Ex Parte Landry*," 144 S. W. 962, wherein it is expressly held that:

> "It is further laid down, and may now be said to be the settled law, that the rules of evidence applicable to the proceedings to punish for contempt are also those of criminal law, mere preponderance of the evidence being insufficient to convict the accused; but, in accordance with the general rule in criminal cases, proof of the alleged offense is required beyond a reasonable doubt. * * *"

The Supreme Court of Texas in the instant case has expressly refused to consider the record evidence which

conclusively shows that there is no evidence whatsoever to support petitioner's conviction, evidence beyond a reasonable doubt being absolutely required for due process, even when such contention was squarely presented to such court, thus utterly denying the constitutional guaranty of due process of law.

3. This case involves the decisions of a state court of last resort of an important federal question of substance contrary to the fourteenth amendment of the Constitution of the United States guaranteeing the equal protection of the laws because such state court decision holds that a lower state court may in the absence of legislative and constitutional authority permit and authorize the violation of a state penal statute upon the payment of a fee by certain persons, similarly situated as the petitioner, and by criminal contempt proceedings order petitioner incarcerated and deprived of his liberty for allegedly doing the same acts, and such question of discrimination and denial of the equal protection of the laws has not been decided by the Supreme Court of the United States. Such an issue is for the determination of this court.

4. The Federal constitutional questions raised are properly preserved and were set out succinctly in paragraph 4 of petitioner's petition for rule of habeas corpus in the Texas Supreme Court (Record, pp. 2-6) as follows:

> "That said restraint and imprisonment of your petitioner are illegal and in violation of the Constitution of the United States, and the Constitution and Laws of the State of Texas in that:
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> • • • • • • •
>
> Your petitioner would further show that in the creation of said Salt Water Control Board, and the enforcement of said general plan for the disposal of salt water and the judgment in contempt, that your peti-

tioner is being deprived of due process of law, and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

* * * * * * *

(h) The Honorable District Court abused his discretion in entering said judgment in contempt, because said judgment is based upon no evidence whatsoever showing any overt act or affirmative act on the part of your petitioner in violation of said temporary injunction."

They are further preserved and urged in petitioner's motion for rehearing filed in said court (Record, pp. 311-321).

Petitioner contends that he has been denied due process of law guaranteed to him by the Constitution of the United States by his incarceration for thirty days in that there is no evidence whatsoever to support his conviction for an alleged criminal contempt, and that the action of the 116th District Court in seeking to deprive petitioner of his liberty for thirty days is a denial of the equal protection of the laws in that the same court licenses and sanctions the alleged acts for which petitioner has been held in criminal contempt for other persons similarly situated upon the payment of a stipulated fee, as is demonstrated by the release orders found on pages 294-295 of the Statement of Facts.

The Questions Presented

1. The first question presented to this Court is whether a state court of last resort in an original habeas corpus proceeding challenging a conviction for criminal contempt for the alleged violation of an injunction of a lower state court wherein the contention was presented, preserved and urged that there is no record evidence whatsoever to support the

conviction, due process of law absolutely requiring evidence beyond a reasonable doubt, can deprive one of his constitutionally guaranteed liberty by expressly refusing to consider the record evidence and thus deprive him of due process of law which requires that his conviction, in order to be sustained, must be upon evidence establishing his guilt beyond a reasonable doubt where in such state there is no other way to challenge the validity of the lower court's judgment except by such original habeas corpus proceeding.

2. The second question presented is whether a state court can license and permit certain persons upon the payment of a fee to violate a state penal statute and by injunction and criminal contempt proceedings incarcerate another person for alleged identical acts without thereby denying such other person the equal protection of the laws as guaranteed by the fifth and fourteenth amendments to the Constitution of the United States. The Supreme Court of Texas expressly refused to consider such contention although same was presented, preserved and urged.

Reasons Relied on for Allowance of Writ

The said Texas Supreme Court, in said case, decided the federal question of substance as to the question of the denial of due process of law to the petitioner herein against petitioner herein, by expressly refusing to consider the record evidence, thereby holding that because some sort of hearing was had in the lower state court the requirements of constitutionally guaranteed due process of law were fulfilled regardless of whether there was any evidence in a proceeding for criminal contempt upon which deprivation of liberty could be predicated and regardless of whether the record evidence supported the conviction beyond a reasonable doubt, which decision is not in accord with but in direct con-

travention of the decision of this Court in the case of "Gompers v. Buck's Stove & Range Company", 221 U. S. 418, 55 L. Ed. 797, and the cases therein cited. Petitioner earnestly contends, as he has throughout this entire litigation, that the record evidence wholly fails to support his conviction beyond a reasonable doubt and further that there is *no* record evidence whatsoever that even tends so to do. A substantial federal question with respect to the scope of state judicial deprivation of liberty by proceedings in criminal contempt decided by the Supreme Court of Texas contrary to the aforementioned decisions of this Court is thus squarely presented because the Supreme Court of Texas in its opinion, hereby sought to be reviewed, said:

> "Those points questioning the evidence or the motives and purposes back of the proceeding will not be dealt with."

The said Texas Supreme Court, in said case, decided the federal question of substance as to the denial to petitioner of the equal protection of the laws against petitioner herein, thereby sanctioning the judicial license to certain persons upon the payment of a fee to violate a state penal statute and by injunction and criminal contempt proceedings incarcerate another person for *alleged* identical acts contrary to the provisions of the fifth and fourteenth amendments to the Constitution of the United States. So far as petitioner is informed, this case presented for the first time the question as to whether state courts in their determination of the law in the several states may establish standards for and classes of persons who are entitled to the federal guarantees of liberty and the equal protection of the laws.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme

Court of the State of Texas, commanding said court to certify and send to this court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Supreme Court of the State of Texas had in the case numbered and entitled on its docket No. A-462, Ex Parte A. S. Genecov, to the end that this cause may be reviewed and determined by this court as provided for by the statutes, laws and Constitution of the United States; and that the judgment herein of said Supreme Court of the State of Texas be reviewed by this court, and for such further relief as to this court may seem proper.

Respectfully submitted,

GABRIEL HAWKINS GOLDEN,
JOEL MANUEL HOPPENSTEIN,
Counsel for Petitioner.